

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1459

To be argued by
ARTHUR S. FRIEDMAN

In The
United States Court of Appeals
For The Second Circuit

ORIGINAL

UNITED STATES OF AMERICA,

Appellee,

-against-

IRVING GOLDMAN,

Defendant-Appellant.

*From an Order of the United States District Court for the
Southern District of New York.*

BRIEF FOR DEFENDANT-APPELLANT

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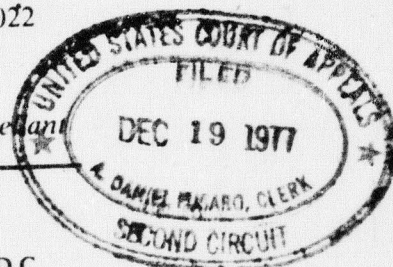


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1459

UNITED STATES OF AMERICA,

Appellee,

-v-

IRVING GOLDMAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

Preliminary Statement

This brief is submitted by the Appellant, Irving Goldman, in support of his appeal from the Order of the United States District Court for the Southern District of New York (Hon. Kevin T. Duffy, U.S.D.J.), denying his motion to dismiss Indictment 75 Cr. 337 on the grounds of violation of the "double jeopardy" clause of the Constitution and violation of the Speedy Trial Act (18 U.S.C. §3161 et seq.).*

*Appeal is brought pursuant to 28 U.S.C. §1291. See Abney v. United States, U.S. , 97 S. Ct. 2034, 52 L.Ed. 2d 651 (1977); United States v. Cerilli, 558 F.2d 697 (3d Cir. 1977).

Issues Presented

Where the Government's improper questioning of its key prosecution witness results in the District Court's sua sponte declaration of mistrial, and the District Court failed to make any findings as to alternatives to mistrial or to the "manifest necessity" for mistrial, is it not a violation of the "double jeopardy" provision of the Constitution to compel the defendant to be retried?

Where it is conceded by the Government that, at the time of trial, 163 non-excludable days had elapsed pursuant to the Speedy Trial Act, and retrial after the Court's declaration of mistrial did not occur within 17 days after the declaration of mistrial, was it not error for the District Court to refuse to dismiss the Indictment?

Statement Of The Case

Appellant, Irving Goldman ("Goldman" or "defendant") was indicted* on April 1, 1975 (A 5)**, and pleaded not guilty.

*The Indictment charged Goldman with one count of conspiracy, and forty-three separate substantive counts of "mail fraud", involving an alleged scheme by Goldman to defraud the Interborough News Co. and its parent, Sportservice Corp. by the issuance of false and inflated invoices to them for candy ordered for their subway vending machines from another company allegedly controlled by Goldman, Jola Candy Co.

**"A. " references are to the Appendix herein.

After certain pre-trial proceedings (including, inter alia, denial of defendant's motion to dismiss the Indictment for legal insufficiency, the District Court's sua sponte holding of a medical hearing to determine Goldman's fitness to stand trial after open heart surgery, and denial of defendant's motion to dismiss the Indictment for failure to grant him a speedy trial), trial commenced on August 23, 1977.

At the trial, the Government's key witness was Goldman's unindicted alleged "co-conspirator", Jack Zander ("Zander"). Zander testified on direct examination for two days, and on cross-examination for three days (A 60-A 728).

After the conclusion of Zander's cross-examination, the Government commenced its redirect examination, on September 2 (A 661). During the ensuing Labor Day weekend, Zander apparently met with representatives of the Government. According to the Government (A 683), Zander, after prodding by the Government to tell them the truth (in light of discrepancies in Zander's direct testimony which had been brought out on cross-examination) confessed that, at least in certain respects, his testimony on cross-examination had been perjurious.*

*Zander has since pleaded guilty to a one-count information charging him with perjury arising out of his direct examination.

When trial resumed on September 6, the Government embarked on a process of attempted rehabilitation of its star witness. Shortly after the Government commenced this process, Zander -- according to the Government -- apparently balked. He failed to repeat all the details of what he had related to the Government the previous weekend. Subsequently, the Government sought to have Zander declared a hostile witness, for purposes of asking leading questions on the basis of memoranda allegedly prepared by the Government after Zander's weekend revelations (A 704). Copies of those memoranda (clearly Brady material, as well as material which should have been produced for the defendant under 18 U.S.C. §3500) were, only then, belatedly handed to the Court and to defense counsel (A 707). Defense counsel promptly moved for dismissal of the Indictment:

"Mr. Friedman: If your Honor please, my experience doesn't encompass these things. I tell you that. But I can't believe what we are saying [seeing]. We are supposed to sit here while they have a duo, the witness who is a confessed perjurer. And it isn't just his testimony at this trial; he has perjury locked up that is two years old* and more. And now we are going to have --

The Court: That may be. I am not saying it is not.

Mr. Friedman: I am not suggesting that your Honor is suggesting otherwise. And now we are going to have a singles match between Miss Strauss and the witness while they try to rehabilitate this prostitute. And I think this is ridiculous.

The Court: You are referring only to the witness.

Mr. Friedman: I am, sir.

I think, Judge, that this case has to be thrown out. This man is a confessed perjurer. He has perjured himself all over his direct testimony. I can't even get all the ramifications of it. But it touches virtually every aspect into which he went on his direct examination. And now we are told he is going to be rehabilitated. And even now he hasn't flushed his system clean, because he can't tell the story that he told yesterday. I don't think we should suffer for this. This is the government's witness. This is the witness that they have seen so many times, they don't even know how to keep count of it." (Emphasis supplied)

(A 705-7)

*Zander gave the same (perjurious) testimony to the grand jury which indicted Goldman.

The Court permitted the Government to "lead" Zander. In the course of that testimony, the following exchange occurred:

"Q. Do you remember saying to me then 'What if Mr. Goldman says I received cash?'"

A. Yes.

Q. And do you remember my telling you that you shouldn't count on the fact that it would be one on one, your word against his?" (A 711)

* * *

"Q. Mr. Zander, when I said to you that you should not count on it being one on one, your word against Mr. Goldman's word, and I asked you did you receive any cash from Mr. Goldman, and you said to me that you did, do you recall you told me at that point --

A. Yes." (A 712)

Following the latter exchange, defense counsel asked for a side bar conference, and, in that conference, made the following application:

"MR. FRIEDMAN: If your Honor please, one question came in and I didn't rise to object to it. The second one has just come now.

What Ms. Strauss is doing as part of the sanitation process, whether she intends it or not, is to force a mistrial. What is happening is she is talking about one on one, that is to say Zander against Goldman, when she knows very well that there is a question about whether Goldman will take the stand or --

THE COURT: Listen, I was there. I watched it. I heard it. I was surprised you didn't object.

MR. FRIEDMAN: I have done it now, Judge. I have done it now, Judge. I have done it now. It has been repeated for the second time. It is an outrage to have that laid before the jury that way.

MS. STRAUSS: Judge, what I was --

MR. FRIEDMAN: This is being done deliberately. These are not accidental questions.

THE COURT: No. It was said yesterday. She is not intending or looking for a mistrial in this case. There is no question of that at all. But the effect is such that there is a question in my mind as to whether the prosecutor at this point, even though inadvertently, is calling upon the defendant to take the stand." (Emphasis supplied). (A 712-3)

The Court, after further colloquy with the Government's attorney, took a recess; after returning to the robing room, defense counsel again moved to dismiss the Indictment. That application, and the Court's response, were as follows:

"MR. FRIEDMAN: Judge, during the recess I have told Mr. Goldman about what has happened in the robbery room just before the recess. Your Honor held at one time that he was fit to [stand] trial and I assume your Honor meant one trial. I don't know if your Honor had in mind that he would face the prospect if a mistrial be granted of standing two trials. In my own judgment, and it is only my judgment, anybody that would do with this indictment anything further, if it was a mistrial, that is their business, Judge.

But in any event, what I have to say to your Honor is this: We are at this impasse because of the misconduct, to say the least of a government key witness, of the government's key witness, the man who has served as the government key witness on several indictments against this defendant. And we have a record in this case, as I think your Honor will at least concede, that has led your Honor to reserve decision on motions to dismiss for a variety of matters having to do with other conduct of the government. All I can exhort your Honor to do is this, that I think that this case deserves a burial, I think there are grounds in this record that mandate it and have mandated it already long since. I would respectfully ask your Honor to consider those grounds and to dismiss the indictment on the basis of those factors.

THE COURT: Good try, but, no. I can't. Look, I am sympathetic towards the man, all right. A mistrial, yes, dismissal there is insufficient here, if we went through the entire thing. I have been known to charge the jury in the following words; ladies and gentlemen, twelve reasonable people could not find this man guilty beyond a reasonable doubt, therefore I am going to save you the trouble of deliberation. And I then entered a verdict of acquittal. That's possible, I might do it in this case too. But I have not seen it. The motion for a dismissal of the indictment therefore cannot be granted at this point. All right." (A 718-9)

The Court then resumed the bench and declared the mistrial (A 720).

After the Government announced its intention to seek a retrial, the defendant moved for dismissal of the Indictment on the dual grounds of (1) violation of the Double Jeopardy clause of the Constitution, and (2) violation of the Speedy Trial Act, 18 U.S.C. §3161 et seq. (A 729). By Opinion dated October 28, 1977, the motion was denied (A 731). Retrial was stayed by the District Court pending this appeal (A 743).

ARGUMENT

I

RETRIAL IS BARRED BY THE
PRINCIPLES OF DOUBLE JEOPARDY

The District Court correctly held that "when a mistrial is declared by the Court sua sponte * * * the Double Jeopardy clause precludes retrial unless the Court makes explicit findings that no reasonable alternative curative measures exist." (A 732). The Court's error was in failing to apply that settled law to the facts of this case.

The cornerstone of the District Court's opinion is contained in a single sentence:

"[T]he record clearly establishes what I continue to perceive as a defense motion for a mistrial; at the very least, it demonstrates defense consent thereto."
(A 738)

Both conclusions of the District Court are infirm. We submit that, to the contrary, the record is absolutely clear that there was no defense motion for a mistrial; and that, in any event, where the mistrial is forced by the prosecutor's conduct, retrial is barred -- even if defense counsel did make the motion, or consented to it.

The applicable rule of law was summarized in United States v. Dinitz, 424 U.S. 600 (1976), and reaffirmed last term by the Supreme Court in Lee v. United States, U.S. , 53 L. Ed 2d 80 (1977):

"The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where 'bad-faith conduct by judge or prosecutor,' United States v. Jorn, supra, at 485, 27 L. Ed 2d 543, 91 S. Ct. 547 threatens the '[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant. Downum v. United States, 372 U.S. at 736, 10 L. Ed. 2d 100, 83 S. Ct. 1033. See Gori v. United States, 367 U.S., at 369, 6 L. Ed 2d 901, 81 S. Ct. 1523; United States v. Jorn, supra, at 489, 27 L. Ed 2d 543, 91 S. Ct. 547 (Stewart, J., dissenting); cf. Wade v. Hunter, 336 U.S., at 692, 93 L. Ed 974, 69 S. Ct. 834."
(Emphasis supplied)

There is no question but that the mistrial was provoked by the prosecutor's actions; as defense counsel phrased it, her conduct was designed to "force a mistrial" (A 712).* The Government's key witness suddenly, after days of cross-examination, admitted (and still tried to cut back upon) gross perjury infecting virtually his entire direct and cross examination, and the Government's response was a totally improper attempt at recantation and rehabilitation**, culminating in what the Court believed

*The District Court held (A 740), without benefit of any hearing, that the prosecutor's error was "unintentional". There is no support for that conclusion, except for defense counsel's statement that a mistrial was being forced by the prosecutor, "whether she intends it or not" (A 712). At minimum, the District Court should have held a hearing in order properly to determine whether the prosecutor's conduct was "intentional", or grossly negligent. Cf. United States v. Martin, 561 F. 2d 135 (8th Cir., 1977).

**The Government's failure immediately to notify the trial judge that Zander had recanted was, standing alone, improper. As the District Court held in United States v. Grasso, 413 F. Supp. 166, 171 (D. Conn. 1976), aff'd., 552 F.2d 46 (2d Cir., 1977), "[p]robable perjurious testimony must, of course, be immediately reported to the presiding judge in the interests of justice and to preserve the integrity of the judicial process." Cf. DR 7-102(B)(2).

was an improper call for the defendant to take the stand. And it is equally clear that -- despite the District Court's contrary "perception" -- nowhere did defense counsel move for a mistrial. Defense counsel moved for dismissal, based on the totality of the events. The Court's response was, sua sponte, to declare a mistrial, without making any findings as to whether or not a mistrial was "manifestly necessary".* See United States v. Perez, 22 U.S. (9 Wheat) 579 (1824); Arizona v. Washington, 546 F.2d 829 (9th Cir., 1977). Cf. People v. Mallette, 59 A.D. 2d 199 (3d Dept., 1977).

*To be sure, the Government did suggest various alternatives to mistrial to the District Court in the robing room (A 716, 726), but no findings were made. Compare United States v. Grasso, infra. And the failure adequately to consider such alternatives -- such as, for example, striking Zander's testimony with an appropriate curative instruction -- likewise bars retrial of defendant. See United States v. Kin Ping Cheung, 485 F.2d 689 (5th Cir., 1973). And see infra, page 16.

At most, defense counsel's response to the Court's declaration of mistrial was silence. But the law is clear that such silence should not be construed as affirmative consent, and, in any event, does not remove the double jeopardy bar to retrial. As this Court held in United States v. Grasso, 552 F.2d 46 (2d Cir. 1977), "affirmative consent may not be inferred from [defendant's] silence." See also Himmelfarb v. United States, 175 F.2d 924, 391 n.1 (9th Cir. 1949).

But even if defense counsel had moved for the mistrial, or consented to it, the result would be no different. For the law is clear that where a defendant's mistrial motion is provoked by prosecutorial (or judicial) error, the motion is "substantially involuntary," and the defendant should not be penalized by implying a waiver of his constitutional rights. See Note, 49 N.Y.U.L. Rev. 937, 949 (1974). See also United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976); Lee v. United States, supra; United States v. Dinitz, supra. The rule was summarized in Commonwealth ex rel Montgomery v. Myers, 422 Pa. 180, 189, 220 A.2d 859, 864, cert. denied, 385 U.S. 963 (1966):

"To hold that an accused must barter away his constitutional protection against the oppression of multiple prosecution in order to avoid the hazards of continuing with a proceeding which by hypothesis has been tainted so as to prejudice his right to a fair trial would not be consistent with the administration of justice."*

Indeed, the Department of Justice has recognized, and stated, that, in such circumstances, "[i]t is irrelevant whether or not the defendant made any motion for mistrial or consented to the district court's action." Letter from Hon. Will Wilson to Hon. John L. McClellan, May 13, 1970,

*See also Divans v. California, U.S. , 54 L. Ed. 2d 14, 15 (1977):

"Any order granting a mistrial at the behest of a defendant in a criminal case is typically based upon error or misconduct on the part of other counsel or the court. In order to elevate such a typical order into one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, which is the common predicate to all such orders, but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial."

Senate Comm. on the Judiciary, Amendment to the Criminal Appeals Act, S. Rep. No. 91-1296, 91st Cong., 2d Sess. 10 (1970) (cited in United States v. Kessler, supra at 1255, n. 12). In short, the District Court's focus on whether or not defense counsel moved for or consented to the mistrial is, in large part, absolutely irrelevant.

This case is controlled by United States v. Grasso, supra. That case was remarkably similar to the instant case, and mandates reversal of the District Court's order. In Grasso, the defense learned that a prosecution witness had recanted his testimony and learned of possible government misconduct connected with coercing that testimony. The defendant, as here, moved for dismissal. The District Court, however, declared a mistrial.

After the Government announced its intention to retry the defendant, the defendant moved, as here, to bar the reprosecution on double jeopardy grounds. The District Judge who had declared the mistrial assigned the motion to another District Judge; that judge granted defendant's motion,

and this Circuit affirmed. This Court relied on the fact that the defendant -- as here -- had moved solely to dismiss, and not for a mistrial. Furthermore, there was no "consent" to the mistrial by defendant's failure to object to its declaration; "affirmative consent may not be inferred from [his] silence." 552 F.2d at 50

Indeed, in Grasso, the Government was able to argue (albeit unsuccessfully) that it was defense counsel's conduct which led to the mistrial since, apparently, defense counsel in Grasso had known for some time that the prosecution witness had announced his recantation, but waited until the trial was nearing completion to move for dismissal on that basis. Here, there can be no such claim; the mistrial was caused purely by the Government's own actions.

Finally, Grasso discussed the additional problem which is present here, i.e., the failure of the Court "preferably after a hearing," to make explicit findings that "there are no reasonable alternatives to mistrial."

552 F.2d at 52. See also Whitfield v. Warden, 486 F.2d 1118 (4th Cir., 1973), cert. denied, 419 U.S. 876 (1974); Cardin v. Sedita, 53 A.D. 2d 253 (4th Dept. 1976). Grasso holds that "when a trial ends in a mistrial without any findings having been made as to alternatives to mistrial, the double jeopardy clause will usually bar a retrial of the defendant." 552 F.2d at 53. Here, in any event, no findings were made.* But most significantly, the Grasso

*Indeed, in Grasso -- unlike here -- the Court did declare, after a two-day hearing, that there was a "manifest necessity for declaring a mistrial" so that "the ends of justice, public justice, would [not] be defeated." (552 F.2d at 49) -- the talismanic words which, under United States v. Perez, 22 U.S. (9 Wheat) 579 (1824) are thought to bar a double jeopardy claim. Here, there were no such findings; that absence alone bars retrial. See Arizona v. Washington, 546 F.2d 829 (9th Cir.), cert. granted, U.S. , 52 L.Ed. 2d 355 (1977).

court held that if alternatives had been explored, and if the trial court explicitly finds that no alternatives to mistrial are satisfactory, then "a mistrial may be declared, and a retrial cannot be attacked on double jeopardy grounds unless wrongdoing or negligence on the part of the Government caused the mistrial." 552 F.2d at 52. And it is precisely that set of circumstances -- "wrongdoing or negligence on the part of the Government" -- which prompted the mistrial here, thus barring reprosecution no matter what findings had been made.

Finally, the District Court's declaration of mistrial must be viewed against the totality of the proceedings. The Government's key witness admitted that virtually his entire direct (and substantial portions of his cross) examination was a lie. By every standard, the Government's case was devastated. There can be no question but that permitting retrial here would permit the mistrial to "operate as a post-jeopardy continuance to allow the prosecution an

opportunity to strengthen its case." Downum v. United States, 372 U.S. 734 (1963).^{*} See also Illinois v. Sommerville, 410 U.S. 458 (1973); United States v. Kin Ping Cheung, supra at 692 ("The government stood to gain advantage from the mistrial"); State v. Ballinger, 19 Ariz. App. 32, 36, 504 P.2d 955, 959 (1973) (remarks of prosecutor intended to secure "another more favorable opportunity to convict the accused.") And this "advantage" to the prosecution is not merely academic. Compare the circumstances of this case with the nearly identical considerations which led to the District Court's granting the defendant's motion to dismiss the Indictment in Grasso:

While the District Court commented (A 723-4) that the mistrial was caused, at least in part, by its concern for the possible prejudice to the defendant, it is at very least, equally arguable that the spectacle of the Government's key witness exposed -- by the Government itself -- as a perjurer was an extremely beneficial trial development for the defendant. It can hardly be stated with any certainty that the defendant "benefited" by the mistrial. And, as this Circuit held in United States v. Glover, 506 F.2d 291 (2d Cir. 1974), citing United States v. Jorn, 400 U.S. 471 (1971), " * * where the mistrial is not motivated for the benefit of the defendant, and the defendant has done nothing himself to create the problem, he is entitled to his double jeopardy protection." 506 F.2d at 297.

"[I]f the trial had been permitted to continue and the recantation evidence had been presented to the jury, it was more than likely the jury would have completely discounted [the witness] Harris' testimony, as indeed Judge Clarie did, and acquitted the defendant, at least with respect to the 1970 tax year. There is little question that the recantation provided unexpected but welcomed evidentiary weaponry in defense counsel's arsenal to wage a strong assault on the government's case by renewed cross-examination and in summation. Few tools are more valuable to the skillful and experienced trial advocate to gain an acquittal in a criminal case than the sword of impeachment in combination with the shield of the doctrine of reasonable doubt.* * * The mistrial here prevented defense counsel from discrediting a key government witness on [an] essential element of the crime and deprive the defendant of "the right to seek a favorable verdict from the first jury." United States v. Glover, 506 F.2d 291, 298 (2nd Cir. 1974). As stated by Justice Harlan in Jorn: . . . In the final analysis, the judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate. 400 U.S. at 486. In addition, although the government objected to the mistrial, reprosecution would give it a solid tactical advantage. With commendable candor at the oral argument before this Court, government counsel admitted Harris would not be a witness on retrial.

Thus the government would have ample time to retrench, to reconstruct its evidence, and to present its case against the defendant for the year 1970 without the tainted Harris testimony; or, it might proceed to seek convictions solely for the years 1969 and 1971. Cf. United States v. Kin Ping Cheung, 485 F.2d 689, 691-692 (5th Cir. 1973). While certainly not Judge Clarie's intention, it is evident that the mistrial served "as a post-jeopardy continuance to allow prosecution an opportunity to strenghten its case." Somerville, 410 U.S. at 469. "

413 F. Supp. at 172.

As in McNeal v. Hollowell, 481 F.2d 1145 (5th Cir. 1973), this was "a situation with a tantalizing potential for prosecutorial misconduct." 481 F.2d at 1150; at a bare minimum, the Government's conduct smacks of "sloppy prosecutorial preparation." Id., at 1151; Note, 42 Missouri Law Rev., 485, 487 (1977). By any standard, the defendant should not be put through the expense, the agony, and the prejudice of another trial.

II

THE INDICTMENT SHOULD HAVE BEEN DISMISSED
FOR VIOLATION OF SPEEDY TRIAL GUARANTEES

The District Court's Opinion of October 28, 1977 held that retrial was not barred by the provisions of the Speedy Trial Act, 18 U.S.C. §3161 et seq (the "Act"). We submit that the District Court failed properly to analyze and apply the provisions of that Act to the facts of this case. That error alone mandates dismissal.*

Prior to the commencement of the trial, defendant moved, on July 21, 1977, to dismiss the Indictment for failure to grant defendant a speedy trial. (A 25). In connection with that motion, the Government declared that dismissal was only required if 180-days of "non-excludable" time had elapsed. According to the Government, only

*The denial of defendant's motion with respect to the speedy trial issue is directly and presently appealable under United States v. MacDonald, 531 F. 2d 196 (4th Cir. 1976), cert. granted, U.S. (1977). In this appeal, however, only the October 28, 1977 decision is at issue; the District Court's earlier order on the underlying speedy trial issue (A 46) (i.e., whether or not the first trial should have been barred by the Act) is not now on review.

163 days of non-excludable time had then elapsed.* The District Court, in a decision made on August 16, 1977, denied defendant's motion, agreeing with the Government, inter alia, that "* * * 163 days * * *" [will] have elapsed [by August 23] * * *". (A 53)

Assuming, arguendo, that the 163-day calculation conceded by the Government and utilized by the District Court was correct, the Government had but seventeen additional days after September 6 within which to commence retrial.** These seventeen days passed prior to the defendant's post-trial motion to dismiss.*** Accordingly,

*While we disputed (and continue to dispute) that calculation, that issue is not before this Court at this time.

**AUSA Strauss announced to Judge Duffy on September 6, 1977, that she was ready to begin retrial immediately (A728). But significantly, shortly thereafter the case was reassigned to a different Assistant United States Attorney.

***Consideration of that motion tolled the time provisions of the Act. See U.S.C. §3161(h)(i)(g)

the District Court should have ordered the Indictment dismissed.*

*To be sure, 18 U.S.C. §3161(e) provides that retrial after a declaration of mistrial must commence within 60 days of the mistrial. But that standard seeks to impose a stricter limit on the Government, not the defendant. In other words, if, for example, the first trial commenced at a time when only 45 days of "non-excludable" time elapsed, and that trial ended in a mistrial, the Government would have only 60 days -- not 135 days -- in which to commence a retrial. To hold otherwise would encourage the Government in cases like this, where only small periods of speedy trial time remain to seek mistrial in an effort to gain a 60-day de facto extension of the speedy trial guidelines.

CONCLUSION

For all of the foregoing reasons, the Order of the District Court should be reversed, and the Indictment dismissed.

Dated: New York, New York
December 19, 1977

Respectfully submitted,

FRIEDMAN & GASS, P.C.
99 Park Avenue
New York, New York 10016

-and-

MILLARD, GREENE & UDELL
450 Park Avenue
New York, New York

Arthur S. Friedman
Peter N. Wang
Of Counsel

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

IRVING GOLDMAN

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

That on the 10th day of Dec. 19 77 at 1st Andrews Plaza
New York, N.Y.

deponent served the annexed

upon

Robert Fichte
U.S. Attorney-Southern Dist.

the Appendix
Brief in this action by delivering 2 true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 10th
day of Dec. 19 77

Reuben A. Shearer
Reuben A. Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979